(1)

Supreme Court, U.S.
FILED

981543 MAR 22 1999

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1998

GERARD N. HAAS, Jr.,

Petitioner,

vs.

JAN J. SCHALOW and LARRY LOCKE,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Gerard N. Haas, Jr.
600 21st Street
Racine, WI 53403
(414) 634-5682

47pp

QUESTION PRESENTED

Whether a *Bivens* action lies against IRS agents who conspire and execute an agreement to (1) defraud a district court into issuing an entry order against a third party by feigning an attempt to levy another taxpayer's property, (2) exceed the scope of the order by searching and seizing the third party's personal papers and property, (3) exceed the scope of the order by shutting down the third party's business by padlocking his premises, and (4) eventually return and release the seized property, considering that the Internal Revenue Code grants no relief whatsoever to third parties once his property has been returned.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT 6

The Court of Appeals Erred as a Matter of Law Ruling That a *Bivens* Action Does Not Lie to Redress a Wanton Conspiracy to Deprive a Person of Constitutional Rights 6

A. *Bivens* and Supreme Court Progeny 6

B. *Schweiker* and the Appellate Courts 11

1. No new remedy 11

2. Meaning of "not perfectly comprehensive" 12

3. Adequate remedial mechanisms considered 13

4. Cited appellate cases support Haas 13

5. Special factors verses express congressional declaration 17

CONCLUSION 18

INDEX TO APPENDICES

APPENDIX A
Decision of the Court of Appeals

APPENDIX B
Decision of the District Court

TABLE OF AUTHORITIES

Cases Page

Baddour v. United States
802 F.2d 801 (5th Cir. 1986) 16

Bagola v. Kindt
131 F.3d 632 (7th Cir. 1997) 13

Bivens v. Six Unknown Fed. Narcotics Agents
403 U.S. 388 (1971) 6, 7, 9

Bush v. Lucas
462 U.S. 367 (1983) 7-9, 13, 17

Cameron v. I.R.S.
773 F.2d 120 (7th Cir. 1985) 12, 15, 16

Carlson v. Green
446 U.S. 14 (1980) 7

Chappell v. Wallace
462 U.S. 296 (1983) 7

Dahn v. United States
127 F.2d 1249 (10th Cir. 1997) 14

Davis v. Passman
442 U.S. 228 (1979) 7, 9

FDIC v. Meyer
510 U.S. 471 (1993) 8, 17

McMillen v. United States Dept. of Treasury
960 F.2d 187 (1st Cir. 1991 16

NCBA v. Gibbs
886 F.2d 1240 (10th Cir. 1989) 14

Schweiker v. Chilicky
487 U.S. 412 (1988) 8, 9, 11-13, 17

United States v. Stanley
483 U.S. 669 (1987) 8

Vennes v. An Unknown Number of Agents
26 F.3d 1448 (8th Cir. 1994) 15

Wages v. IRS
915 F.2d 1230 (9th Cir. 1990) 16

Statutes

26 U.S.C. § 7426 10

26 U.S.C. § 7432 15

26 U.S.C. § 7433 15

OPINIONS BELOW

The opinion of the Court of Appeals issued in support of its judgment is unpublished, but reported as *Gerard N. Haas, Jr. v. Jan J. Schalow and Larry Locke*, 1998 U.S. App. LEXIS 32654, 99-1 U.S. Tax Cas. (CCH) ¶50,191 (November 17, 1998) and is reprinted in Appendix A.

The opinion of the District Court is published as *Haas v. Schalow*, 991 F. Supp. 1074 (E.D. Wis. 1998) and is reprinted in Appendix B.

JURISDICTION

The opinion of the Court of Appeals in this case was filed on December 23, 1998. This petition is therefore timely under Supreme Court Rule 13.1 & 3 if filed before March 23, 1999.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves application of the following constitutional provisions and statutes.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

Fourth Amendment

No person shall . . . be deprived of life, liberty, or property, without due process of law.

Fifth Amendment

Civil actions by persons other than taxpayers.

(a) Actions permitted.

(1) Wrongful levy. If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

(2) Surplus proceeds. . .

(3) Substituted sale proceeds. . .

(4) Substitution of value. . .

(b) Adjudication. The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) Injunction. . .

(2) Recovery of property. . .

(3) Surplus proceeds. . .

(4) Substituted sale proceeds. . .

(5) Substitution of value. . .

26 U.S.C. § 7426(a) & (b) (1988)

Civil damages for failure to release lien.

(a) In general. If any officer or employee of the Internal Revenue Service knowingly, or by reason of negligence, fails to release a lien under section 6325 on property of the taxpayer, such **taxpayer** may bring a civil action for damages against the United States in a district court of the United States.

26 U.S.C. § 7432(a) (1988)

Civil damages for certain unauthorized collection

> actions. (a) In general. If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such **taxpayer** may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.
>
> 26 U.S.C. § 7433(a) (1988)

STATEMENT OF THE CASE

The Seventh Circuit affirmed the district court's dismissal of Haas' *Bivens* complaint for failure to state a claim. The following facts are reasonably alleged in the Complaint.

IRS Revenue Officer Jan J. Schalow and others obtained an order for entry onto Haas' premises to effect a levy on property allegedly belonging to Romanite Building Products, a defunct corporation. Schalow's affidavit in support of her application to enter premises was perjurious in that she affirmed to the court that Haas' premises contained property owned by Romanite after receiving notice from Haas that Romanite had been

dissolved.

The entry order allowed the seizure and levy of specifically listed items.[1] Exceeding the alleged authority of the entry order, Schalow and others:

(1) conducted an illegal search and seized the personal papers of Haas;

(2) issued notices of levy to individuals and entities whose names were obtained by said unconstitutional rummaging through Haas' records;

(3) padlocked Haas' premises and prohibited him from entering his premises to conduct business;

(4) after verifying that Romanite had indeed been dissolved, Schalow refused to release Haas' business premises and personal property; and

(5) after receiving notice that Haas' had filed a Chapter 13 bankruptcy, Schalow and her supervisor, Larry Locke, refused to release Haas' business premises and personal property in violation of the automatic stay provisions of bankruptcy.

---

1. The specified items were "work tables, mixing vats, bags of sand, bags of sheetrock compound, bags of drywall compound, drywall, sheetrock."

All of the above was part of a conspiracy, done in bad faith and in fraud of the court, having the specific intent to unlawfully obtain entry onto Haas' premises to execute an impermissible search of Haas' personal records and property. Another object of the conspiracy was to cause Haas financial harm by padlocking his business.

As a direct and proximate result, Haas suffered substantial expense in getting his property released, great mental anguish, and irreparable harm to his reputation. The conduct violated Haas' Fourth Amendment right not to be subject to an unreasonable search and seizure, Fifth Amendment right not to be deprived of property without due process of law, and statutory right to an automatic stay in bankruptcy, among others.

The district court dismissed the Complaint seeking compensatory and punitive damages for failure to state a claim finding that 26 U.S.C. §§ 7432 and 7433[2] constitute Haas' exclusive remedy.

On appeal, Schalow and Locke conceded that Haas' has no standing to bring a claim under §§ 7432 and 7433 because he is not the delinquent taxpayer, since the levy and writ of entry were directed against Romanite. The Seventh Circuit, however, held that Haas' exclusive statutory remedy is § 7426. As the court noted, § 7426

---

2. Unless otherwise noted, all statutory references are to 26 U.S.C.

does not permit recovery of compensatory or punitive damages. Because Haas eventually attained the return of his property and the release of his building, he has no remedy for the constitutional violations unless he can bring a *Bivens* action.

Characterizing the Complaint as alleging merely "heavy-handed, insensitive, and careless" conduct by Schalow and Locke, the Seventh Circuit held that Congress had created an adequate remedial mechanism for third party wrongful levy claims which precludes a *Bivens* claim.

This timely petition follows.

REASON FOR GRANTING THE WRIT

The Court of Appeals Erred as a Matter of Law by Ruling That a *Bivens* Action Does Not Lie to Redress a Wanton Conspiracy to Deprive a Person of Constitutional Rights

A. *Bivens* and Supreme Court Progeny

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397 (1971), this Court held that the victim of a Fourth Amendment violation by federal officers acting under color of their authority may bring suit for money damages against the officers in federal court. The Court suggested in dictum that inferring such an action directly

from the Constitution might not be appropriate when there are (1) "special factors counseling hesitation in the absence of affirmative action by Congress" or (2) where there is an "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Bivens*, 403 U.S. at 396-97.

Subsequently, this Court held that actions for damages could be brought directly under the Due Process Clause of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and under the Eighth Amendment's proscription against cruel and unusual punishment, *Carlson v. Green*, 446 U.S. 14 (1980). Both cases repeated the dictum that "special factors" or "explicit congressional declaration" might bar an action.

In *Chappell v. Wallace*, 462 U.S. 296 (1983), and *Bush v. Lucas*, 462 U.S. 367 (1983), decided the same day, that dictum became holding.

Since *Bivens*, this Court has only delineated two narrow categories of "special factors." The first is where the defendants "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Carlson*, 446 U.S. at 19; see *Davis*, 442 U.S. at 246 (finding that "special factors" counsel no greater protection for Congressmen than that provided by the Speech and Debate

Clause); *Chappell*, 462 U.S. at 304 (the unique disciplinary structure of the military and Congress' constitutional involvement in the field constitutes special factors against allowing enlisted men to bring *Bivens* actions against superior officers); *United States v. Stanley*, 483 U.S. 669, 683 (1987) (special factor is "the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate").

The second is where the question involves "federal fiscal policy." See *FDIC v. Meyer*, 510 U.S. 471, 486 (1993) (federal agencies - "If we were to recognize a **direct** action for damages against federal agencies, we would be creating a potential enormous financial burden for the Federal Government." This Court specifically differentiated cases where the **actual** financial burden would be the same because Congress made a policy decision to indemnify agents; holding the policy decision itself is not for the court to make); *Bush*, 462 U.S. at 389 (federal employees - Congress is in a far better position than a court to evaluate the impact of [*Bivens*-like claims] between federal employees [for wrongful discipline] on the efficiency of the civil service"); *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (social security disability recipients - "Congressional competence at balancing governmental efficiency and the rights of [individuals] is no more questionable in the social welfare context than it is in the civil service context").

When denying *Bivens* relief in deference to

congressional policy-making power, this Court has consistently noted that: (1) the plaintiffs received damages returning them to the status quo, and (2) the congressional scheme provided comprehensive administrative and judicial safeguards against improper actions. *Schweiker*, 487 U.S. at 417 & 425; *Bush*, 462 U.S. at 371 & 385. Conversely, this Court has consistently granted *Bivens* relief when "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in judgment); *Davis*, 442 U.S. at 245.

Applying the instant facts to this Court's legal standards, *Bivens* relief is appropriate. The complaint alleges a knowing conspiracy on the part of Schalow and others to search and seize Haas' personal and business property without lawful authority in violation of his Fourth and Fifth Amendment rights. To effectuate the agreement, the defendants agreed to and executed a fraud on the federal district court by seeking an order for entry onto Haas' premises to effect a levy on property owed by an alleged delinquent taxpayer after having been informed by Haas and public records that the corporate taxpayer had been dissolved. Despite the fact that the district court granted limited authority to the agents to levy and seize enumerated items, Schalow and others searched Haas' personal papers and property and padlocked his business premises. The agents issued levy notices to individuals identified by the illegally seized personal papers of Haas. Furthermore, Schalow and Locke abysmally refused to release the property when given notice that Haas sought

refuge in the automatic stay provision of Chapter 13 bankruptcy.

These facts lack a "fiscal policy" question, as defined by this Court's decisions. Haas' complaint does not "directly" assault the public treasury, nor is Haas in a special financial relationship (e.g. employee or disability recipient) that requires the judiciary to bow to Congressional will. Therefore, the "special factors" test is inapplicable. Since the lack of remedy afforded by the tax code to Haas cannot be as equally effective as a *Bivens* action, the "express congressional declaration" test cannot be met.

Even assuming *arguendo* a "fiscal policy" question existed, the "special factors" test is still not met.

Because Haas is not the delinquent taxpayer, the Internal Revenue Code allows him only an injunction to prohibit enforcement of the levy or sale of the property, or return of property, or monetary relief for property sold. 26 U.S.C. § 7426. Because Haas was eventually successful in getting all his property released to him, § 7426 remedies are moot.

The statutory scheme clearly did not return Haas to the status quo. Haas has not received any compensation for lost business profits due to the padlocking of his business. Furthermore, for Haas, as for Davis and Bivens, "it is damages or nothing."

It simply is not the law that a federal agent can illegally search, seize, and use the papers and property of a subject citizen, with impunity, by knowingly deceiving a district court into issuing an entry order and subsequently returning the seized papers and property.

Therefore, this Court should grant a writ of certiorari and reverse the Seventh Circuit's decision because it is contrary to this Court's precedents.

B. *Schweiker* and the Appellate Courts

Citing *Schweiker*, 487 U.S. at 421-23, and two Seventh Circuit cases relying thereupon, the Seventh Circuit held that:

> Courts have declined to create new *Bivens* remedies, even if the remedies Congress has created are not perfectly comprehensive, as long as the remedies supply "meaningful safeguards or remedies for the rights of the persons situated," and establish "that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the [administration of tax laws]."

(App. p. 9).

While generally a true statement of the law, the application by the Seventh Circuit was misplaced as

follows.

1. No new remedy.

This case does not seek a "new" *Bivens* remedy. This case seeks the exact remedy granted in *Bivens*, damages for violation of search and seizure provisions of the Fourth Amendment.

The Seventh Circuit virtually admitted Haas is entitled to relief when it stated "if Haas were seeking the kind of relief which the Internal Revenue Code does not provide, he could proceed under *Bivens*," relying on *Cameron v. I.R.S.*, 773 F.2d 126, 128 (7th Cir. 1985). (App. pp. 7-8). That case states "[i]f in the course of enforcing the tax laws internal revenue agents . . . violate the Fourth Amendment, the argument for a damage remedy against the agents is a powerful one, since suit for a tax refund would not be an adequate substitute." *Id.* Similarly, Haas' remedy is inadequate.

The Seventh Circuit sidestepped applying its own rule by characterizing the alleged conduct of Schalow and Locke as merely "heavy-handed, insensitive, and careless." (App. p. 8). Haas respectfully submits that the alleged conspiracy to violate his Fourth & Fifth Amendment rights by perpetrating a fraud on the courts cannot fairly be so characterized.

2. Meaning of "not perfectly comprehensive".

As noted above, the "not perfectly comprehensive" language used by this Court referred to statutory schemes that returned the injured party to the status quo, and then denied additional damages for the constitutional injury. Indeed, this Court observed in *Schweiker*, 487 U.S. at 425, that Congress "has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were."

Because Haas was not returned to the status quo, and the Internal Revenue Code does not even consider allowing third parties to be so restored, the Code fails to meet this Court's definition of a "meaningful safeguard or remedy."

3. Adequate remedial mechanisms considered.

There is no evidence that Congress considered adequate remedial mechanisms for constitutional violations to the rights of third parties. In *Schweiker*, 487 U.S. at 426, this Court noted that "Congress chose specific forms and levels of protection for the rights of persons affected by incorrect determinations under [the Social Security Administration's continuing disability review program]." Further, as this Court stated in *Bush*, 462 U.S. at 385, comprehensive schemes include "procedures – administrative and judicial – by which improper action may be redressed."

Thus, such administrative systems were effective in exposing unconstitutional conduct that had occurred. *Bagola v. Kindt*, 131 F.3d 632, 643 (7th Cir. 1997). "[W]hen the procedural safeguards of an administrative scheme are inadequate protectors of constitutional rights, courts should not readily assume that a *Bivens* claim is precluded. *Id.* The Internal Revenue Code simply cannot be interpreted to allow agent conduct against third parties violative of the Constitution without being addressed or redressed.

4. Cited appellate cases support Haas.

The Seventh Circuit cites seven appellate cases for the proposition that Congress has created an exclusive, comprehensive administrative scheme to resolve tax-related disputes. To the extent these cases can be read contrary to the above analysis of this Court's precedents, Haas urges they are wrongly decided. The cases, however, do not support the Seventh Circuit's application of them here.

Only one case considers "third party" *Bivens* suits and its conclusory pronouncement that *Bivens* actions against IRS agents are precluded by the tax code relies solely on cases involving "taxpayers",[3] and under a fact pattern unrelated to Haas. *Dahn v. United States*, 127 F.2d 1249,

---

3. *Dahn* relies solely on *NCBA* and *Wages*, both discussed below.

1254 (10th Cir. 1997) (*Bivens* action brought by third party seeking relief identical to § 7426 after failing to bring suit within the statute of limitations).

Though not directly applicable because they consider "taxpayer" *Bivens* actions, the remaining cases do not carry the weight the Seventh Circuit places on them.

NCBA v. Gibbs, 886 F.2d 1240, 1248 (10th Cir. 1989) (conspiracy and RICO to unlawfully collect from taxpayer) specifically holds that a taxpayer "may bring a *Bivens* action for violation of the first and fourth amendments," because "certain values, such as those protected by [the] amendments, may be superior to the need to protect the integrity of the internal revenue system."

Vennes v. An Unknown Number of Agents, 26 F.3d 1448, 1454 (8th Cir. 1994) (conspiracy to coerce, entrap, and seize taxpayer's property) held that the tax code provides "specific and meaningful remedies" for "overzealous tax assessment and collection activities," because the "taxpayer" has various administrative and judicial remedies including "damages" under "§§ 7432 and 7433." The court held these "carefully crafted legislative remedies confirm that . . . Congress' refusal to permit unrestricted damage actions by taxpayers has not been inadvertent." Damages under those sections are not available to third parties like Haas. 26 U.S.C. §§ 7432 & 7433. Since these two sections were enacted in 1988, there is no basis to believe anything except that Congress

desired that violations of a third party's constitutional rights would continue to be addressed in *Bivens* actions.

Vennes also relied upon *Cameron,* 773 F.2d at 129. The discussion at that page, however, concerned "completely untenable claims" such as when "the only claim is that the agents made mistakes, subjected the taxpayer to unnecessary inconvenience, failed to explore possibilities for settlement, or otherwise failed to come up to the highest standards of conduct for government officers dealing with citizens." *Cameron,* 773 F.2d at 128-29. It is simply incredible that *Cameron* is cited as authority for the proposition that taxpayers cannot bring *Bivens* actions for violation of constitutional rights, because that case held that "[i]f in the course of enforcing the tax laws internal revenue agents . . . violate the Fourth Amendment, the argument for a damage remedy against the agents is a powerful one, since suit for a tax refund would not be an adequate substitute." *Cameron,* 773 F.2d at 128.

McMillen v. United States Dept. of Treasury, 960 F.2d 187, 190-91 (1st Cir. 1991) (taxpayer's property liened) also relies upon §§ 7432 and 7433 to conclude that Congress has created a comprehensive remedy. The court cites *Cameron, Gibbs, Wages, infra*, and *Babbour, infra,* as supporting its decision.

Wages v. IRS, 915 F.2d 1230, 1235 (9th Cir. 1990) (taxpayer's wages garnished) summarily agreed with *Cameron* that *Bivens* actions are foreclosed to taxpayers

seeking redress in collection actions. The court also asserted that *Baddour, infra,* supported its decision.

Baddour v. United States, 802 F.2d 801, 807-08 (5th Cir. 1986) (taxpayer's property seized from third party's premises), held the taxpayer had no Fourth Amendment claim because the case "involves no invasion of [his] premises." Addressing a Fifth Amendment claim, the court noted that where an agent "deliberately harassed the taxpayers", thereby "sketching a portrait of lawless and arbitrary vendetta," the "taxpayer might be entitled to relief beyond that available in a refund suit." The court remanded "for a determination whether taxpayers' clearly established substantive due process rights had been violated."

5. Special factors verses express congressional declaration.

The appellate cases can be read as blurring the distinction between this Court's "special factors" and "explicit congressional declaration" tests. As discussed above, the "federal fiscal policy" prong of the "special factors" test requires more than mere assault on federal funds. *FDIC*, 510 U.S. at 486 (a suit against federal agency would interfere with Congress' constitutional power to control the expenditure of funds from the public treasury, because the court's damage award would directly assault public funds; specifically distinguishing the same fiscal damage due to congressional decision to indemnify

agent); *Bush*, 462 U.S. at 389 (a suit by federal employees would interfere with Congress' unique ability to evaluate the impact of *Bivens* claims between federal employees for wrongful discipline on the efficiency of the civil service); *Schweiker*, 487 U.S. at 425 (a suit by social security disability recipients would interfere with Congress exercising its peculiar competence at balancing governmental efficiency and the rights of individuals).

Haas' Complaint, however, does not relate to any of these factors; he does not seek damages from the United States, and he has no special financial relationship with the United States (e.g. employee or disability recipient). Haas' sole relationship with the United State is that he is an aggrieved American.

Therefore, any congressional decision falls not under the "fiscal policy" rational, but the "express declaration" rationale. As this Court has made clear, such congressional declaration must provide "another remedy, equally effective in the view of Congress." Obviously, "no remedy" cannot be equally effective with damages from a *Bivens* action.

For each and all of these reasons, a writ of certiorari should be granted and this Court should reverse the decisions below.

To the extent that the appellate cases can be read as allowing a congressionally created scheme to bar Haas any

remedy for deliberate violations of his constitutional rights without first showing the "fiscal policy" interest as defined by this Court, certiorari should be granted to correct this misstatement of the law. Because this is an area of law that affects every taxpaying citizen, this Court should expand its focus to include clarifying the law relative to "taxpayers," not just "third parties."

CONCLUSION

Because this petition asserts that the Seventh Circuit decision conflicts, and appellate cases from five other circuit courts of appeals have been read as conflicting, with this Court's *Bivens* decision and its progeny, this Court should issue a writ of certiorari. A writ is further justified because this petition raises a question of constitutional law applicable to every taxpaying citizen.

The decisions below should be reversed.

Respectfully submitted,

Gerard N. Haas, Jr.
600 21st Street
Racine, WI 53403
(414) 634-5682

APPENDIX A

GERARD N. HAAS, JR., Plaintiff-Appellant,
v.
JAN J. SCHALOW and LARRY LOCKE,
Defendants-Appellants.

No. 98-1777

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

1998 U.S. App. LEXIS 32654;
99-1 U.S. Tax Cas. (CCH) P50,191

November 17, 1998 *, Submitted

* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a); Cir. R. 34(f).

December 23, 1998, Decided

NOTICE: RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Wisconsin. No. 97 C 182.

Myron L. Gordon, Judge.

DISPOSITION: AFFIRMED.

CORE TERMS: tax code, levied, motion to dismiss, exclusive remedy, third parties, seized, wrongfully, Fourth Amendment, Westfall Act, sovereign immunity, personal property, remedies provided, punitive damages, monetary relief, writ of entry, unidentified, compensatory, extending, searched, unknown, existing statutory, money damages, remedial

COUNSEL: GERARD N. HAAS, JR., Plaintiff - Appellant, Pro se, Racine, WI.

For JAN J. SCHALOW, LARRY LOCKE, Defendants - Appellees: Jonathan S. Cohen, DEPARTMENT OF JUSTICE, Washington, DC USA.

JUDGES: Before Hon. RICHARD A. POSNER, Chief Judge, Hon. JOHN L. COFFEY, Circuit Judge, Hon. DIANE P. WOOD, Circuit Judge.

OPINION: ORDER

Gerard Haas, Jr., sued Jan Schalow, a revenue officer in the Collection Division of the Internal Revenue Service ("IRS"), and Larry Locke, a group manager in the Collection Division of the IRS, in their individual capacities. n1 He alleged that Schalow and Locke violated

his Fourth, Fifth, and Ninth Amendment rights when Schalow searched and seized his business property and then both defendants refused to return the property immediately. The district court granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and Haas appeals. We affirm.

n1 Haas also named as defendants "John Does I through X," unknown IRS employees, but these defendants have not been identified or served and are not parties to this appeal. *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104, 98 L. Ed. 2d 415, 108 S. Ct. 404 (1987).

Because the district court dismissed Haas's complaint for failure to state a claim, we accept as true all well-pleaded factual allegations in the complaint and construe them in the light most favorable to Haas. *Fries v. Helsper,* 146 F.3d 452, 456 (7th Cir.), cert. denied, 142 L. Ed. 2d 278, 119 S. Ct. 337 (1998). On January 9, 1997, Schalow and other unidentified persons entered Haas's business premises. Three days earlier, Schalow had obtained an order authorizing her to enter the premises and seize certain assets belonging to Romanite Building Products, Inc., in satisfaction of Romanite's unpaid federal taxes. Romanite, however, had been dissolved in late 1995 or early 1996, and Haas alleges that he has owned the property since the dissolution. According to Haas, the IRS employees conducted a search that exceeded the scope of the writ of entry, seized his personal papers, and padlocked

the premises, thereby preventing him from conducting his business. On January 13, 1997, Haas filed a bankruptcy petition, and he contends that the IRS should have released the seized property in light of the automatic stay provision in 11 U.S.C. § 362. Haas acknowledges on appeal that the IRS employees did not sell any of his personal property, and that they released his business and its contents approximately three weeks after the seizure.

Haas filed the underlying action against Schalow and Locke seeking only compensatory and punitive damages. The defendants moved to dismiss the action on three grounds: (1) Haas did not plead his complaint with enough specificity to maintain an action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971); (2) Haas's exclusive remedy is set forth in the Internal Revenue Code; and (3) the defendants are entitled to qualified immunity. The district court found the defendants' second argument dispositive and dismissed the action because the Internal Revenue Code provides Haas's exclusive remedy and he therefore could not bring a Bivens claim.

Before we reach the merits, we address the defendants' argument, which they raise for the first time on appeal, that the district court lacked subject matter jurisdiction over Haas's suit based on the doctrine of sovereign immunity. The defendants contend that, because their complained-of actions were taken in the course of their official duties,

they were acting on behalf of the United States. Therefore, they argue Haas's suit must be deemed one brought solely against the United States, which is protected from suit except when Congress has "unequivocally expressed" a waiver of sovereign immunity. See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33, 117 L. Ed. 2d 181, 112 S. Ct. 1011 (1992). The defendants also suggest that Haas's action should be considered one against the United States under the Federal Torts Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680.

We reject the defendants' argument. A suit in which a plaintiff alleges that a federal officer has acted in violation of the Constitution or statutory authority generally is not deemed to be one against the sovereign. *Dugan v. Rank,* 372 U.S. 609, 621-22, 10 L. Ed. 2d 15, 83 S. Ct. 999 (1963); *Ogden v. United States,* 758 F.2d 1168, 1177 n.5 (7th Cir. 1985). Although the United States may be substituted for a federal employee accused of committing a tort within the scope of his employment under the Westfall Act, 28 U.S.C. § 2679(b), the Act does not apply to an action against an employee which is brought for a violation of the Constitution. 28 U.S.C. § 2679(b)(2)(A). See also *Sterling v. United States,* 85 F.3d 1225, 1228 (7th Cir. 1996). Instead, an action seeking only monetary relief from individual federal officials for a constitutional violation may brought as a Bivens action "to avoid the sovereign immunity that would block an action against the United States." *Sterling,* 85 F.3d at 1228-29. See also *Apampa v. Layng,* 157 F.3d 1103, 1104 (7th Cir. 1998)

(Westfall Act does not supplant Bivens remedy). A Bivens action can be maintained against a defendant only in his or her individual capacity; it cannot be maintained against the United States. *F.D.I.C. v. Meyer,* 510 U.S. 471, 485, 127 L. Ed. 2d 308, 114 S. Ct. 996 (1994); *Carlson v. Green,* 446 U.S. 14, 21, 64 L. Ed. 2d 15, 100 S. Ct. 1468 (1980). Here, Haas seeks damages against Schalow and Locke in their individual capacities, claiming that they used false pretenses to obtain a writ of entry and then searched and seized his personal property in violation of the Fourth Amendment. The defendants' alleged misconduct is excepted from coverage under the FTCA. Accordingly, the district court properly construed Haas's complaint as attempting to bring a Bivens action, and Haas confirms this construction on appeal.

We turn then to whether Haas's Bivens action properly was dismissed. We review de novo the grant of a motion to dismiss. *Fries,* 146 F.3d at 456. A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) may be granted only if it appears from the allegations of the complaint that the plaintiff can prove no set of facts which would entitle him to relief. Id. Haas argues on appeal that the district court erred in finding that he may seek relief only through the remedies provided by the tax code. Because he believes that he has no claim under an available statutory remedy, he concludes that he is entitled to bring an action for damages under Bivens.

In Bivens, the Supreme Court held that a plaintiff could

recover money damages for Fourth Amendment violations committed by federal agents. 403 U.S. at 397; See also *Bagola v. Kindt,* 131 F.3d 632, 637 (7th Cir. 1997). Subsequently, courts expanded the Bivens remedy to encompass violations of other constitutional provisions. See, e.g., *Butz v. Economou,* 438 U.S. 478, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978) (extending right to actions arising under the Due Process Clause of the Fifth Amendment). The Supreme Court, however, repeatedly has warned that federal courts should exhibit caution in "extending Bivens remedies into new contexts." *Bagola,* 131 F.3d at 638 *(citing Meyer,* 510 U.S. at 484; *Schweiker v. Chilicky,* 487 U.S. 412, 421, 101 L. Ed. 2d 370, 108 S. Ct. 2460 (1988)). No Bivens remedy exists where Congress already has created "comprehensive procedural and substantive provisions giving meaningful remedies against the United States." *Bush v. Lucas,* 462 U.S. 367, 368, 76 L. Ed. 2d 648, 103 S. Ct. 2404 (1983); see also *Schweiker,* 487 U.S. at 423; *Chappell v. Wallace,* 462 U.S. 296, 76 L. Ed. 2d 586, 103 S. Ct. 2362 (1983); *Gorden v. Kreul,* 77 F.3d 152, 155 (7th Cir. 1996).

Congress has created an exclusive, comprehensive administrative scheme created to resolve tax-related disputes, and the provision of this statutory scheme precludes a Bivens claim in the present action. See *Dahn v. United States,* 127 F.3d 1249, 1254 (10th Cir. 1997); *Vennes v. An Unknown Number of Unidentified Agents of the United States,* 26 F.3d 1448, 1453-54 (8th Cir. 1994); *McMillen v. United States Dept. of Treasury,* 960 F.2d

187, 190-91 (1st Cir. 1991); *Wages v. Internal Revenue Service,* 915 F.2d 1230, 1235 (9th Cir. 1990); *National Commodity and Barter Ass'n v. Gibbs,* 886 F.2d 1240, 1248 (10th Cir. 1989); *Baddour, Inc. v. United States,* 802 F.2d 801, 807-8 (5th Cir. 1986). We note that if Haas were seeking the kind of relief which the Internal Revenue Code does not provide, he could proceed under Bivens. For example, if IRS agents used excessive force in seizing a person, a damage remedy against the agents may exist because a suit under the tax code would not be an adequate substitute. See *Cameron v. Internal Revenue Service, 773 F.2d 126, 128 (7th Cir. 1985).* However, no damage remedy exists in an action like Haas's where the complaint, if true, "shows only that internal revenue agents acted in a heavy-handed, insensitive, and careless fashion." *Id. at 129.* Congress already has provided taxpayers numerous rights "against an overzealous officialdom" in the Internal Revenue Code. Id.

That Haas may not be able to recover under the remedies provided by the tax code does not alter this result. The district court found that Haas was entitled to seek relief under *26 U.S.C. § 7432* or § 7433, but the defendants concede on appeal that Haas has no standing to bring a claim under either of these sections because he was not the taxpayer liable for the tax which the defendants were seeking to collect. Instead, the tax code provides that third parties who claim their property was wrongfully levied in the collection of tax owed by another party may seek to recover their property under 26 U.S.C. § 7426.

"Section 7426(a)(1) is the exclusive remedy of third parties who seek to assert claims on IRS-levied property." *Miller v. Tony and Susan Alamo Found,* 134 F.3d 910, 916 (8th Cir. 1998). Under § 7426(b), a third party may seek an injunction to prohibit the United States from enforcing the levy or selling the levied property or may seek the return of wrongfully levied property or monetary relief if the property was sold. But § 7426 does not permit a party to recover compensatory or punitive damages, so Haas argues that no existing statutory remedy provides his desired relief and he therefore is entitled to bring a Bivens action.

"The absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Schweiker,* 487 U.S. at 421-22 (declining to create remedy under Bivens, even though existing statutory scheme did not provide for damages). Courts have declined to create new Bivens remedies, even if the remedies Congress has created are not perfectly comprehensive, as long as the remedies supply "meaningful safeguards or remedies for the rights of persons situated," and establish "that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the [administration of the tax laws]." *Id.* at 423, 425; *Bagola,* 131 F.3d at 641; *Robbins v. Bentsen,* 41 F.3d 1195, 1201 (7th Cir. 1994)). Through the tax code, Congress has created adequate remedial mechanisms for third parties who claim their property has been levied wrongfully.

Therefore, Haas may not maintain a Bivens action against Schalow and Locke.

Because the district court did not err in finding that Haas failed to state a Bivens claim, we need not address the alternative arguments raised by the parties on appeal. For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

GERARD N. HAAS, JR., Plaintiff,
v. JAN J. SCHALOW, LARRY LOCKE, and
DOES I through X, Defendants.

Case No. 97-C-182

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

991 F. Supp. 1074; 1998 U.S. Dist. LEXIS 834

January 26, 1998, Filed

DISPOSITION: Defendants' motion to dismiss granted. Plaintiff's motion for leave to file a supplemental complaint and to add defendants denied.

CORE TERMS: collection, motion to dismiss, exclusive remedy, statutory remedy, dissolved, damages resulting, writ of entry, civil action, declarations, seizure, dicta, failure to state a claim, bankruptcy petition, qualified immunity, personal property, leave to file, supplemental, specificity, notified, manager, unpaid, levy

COUNSEL: Gerard N. Haas, Plaintiff, Pro Se, Racine, WI.

Thomas Schneider, United States Attorney, Milwaukee, WI, For Defendants.

LaQuita Taylor-Phillips, Raymond R. Mulera, United

States Dept. Of Justice, Washington, D.C., For Defendants.

JUDGES: Myron L. Gordon, United States District Judge.

OPINIONBY: Myron L. Gordon

OPINION: DECISION AND ORDER

Gerard N. Haas, Jr. filed this pro se action against Jan J. Schalow, an officer in the collection division of the Internal Revenue Service ["IRS"] in Racine, Wisconsin, and Larry Locke, a group manager with the collection division of the IRS in Green Bay, Wisconsin. Mr. Haas has also named as defendants "Does I through X," whom he describes in his complaint as employees of the IRS. The crux of Mr. Haas' complaint, which alleges several constitutional violations, arises from an incident at his business premises in Racine, Wisconsin, on January 9, 1997. The defendants have moved to dismiss this action on three different grounds: (1) that the plaintiff has not pled his complaint with enough specificity to maintain a Bivens action; (2) that Mr. Haas' exclusive remedy for relief can be found only in the IRS code, not in the United States Constitution, and his complaint therefore fails to state a claim; and (3) that the defendants have qualified immunity.

Both parties, in briefing their positions on the motion

to dismiss, have provided the court with material outside of the pleadings. For example, the defendants have attached the declarations of both Ms. Schalow and Mr. Locke, as well as several other documents, to their motions to dismiss. Mr. Haas followed suit and attached to his response his own and his brother Matthew's declarations, along with several other documents. If the court were to consider these documents in reaching its decision, it would have to treat the motion as one for summary judgment and give the parties "reasonable opportunity to present all material made pertinent to such a motion." F.R.C.P. 12(b); see *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080 (7th Cir. 1997). Because these extraneous materials will not assist me in my decision, however, I will not consider them. Therefore, I will treat the defendant's motion as one to dismiss.

I. Factual Background

At this point in the proceedings, I must liberally construe Mr. Haas' allegations and take as true his well-pleaded factual claims. *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund,* 25 F.3d 417, 420 (7th Cir. 1994). Accordingly, the following version of the facts is his.

On January 6, 1997, Ms. Schalow obtained from another branch of this court an order to enter the premises at 2400 Racine Street in Racine. The court granted the order based on Ms. Schalow's representation that Romanite Building Products, Inc. ["Romanite"], located there, owed

delinquent taxes. However, Mr. Haas alleges that Ms. Schalow's statements to the court were "unreasonable and incorrect" because Mr. Haas had already notified Ms. Schalow that Romanite had been dissolved. The court's order authorized Ms. Schalow and "other designated employees" of the IRS to seize property in satisfaction of Romanite's unpaid income taxes.

On January 9, 1997, Ms. Schalow entered the premises with the intent to seize the plaintiff's business premises, conduct a search for other property, and then obtain another entry order for the personal property. When she arrived, Ms. Schalow and "others" conducted an illegal search and seizure of Mr. Haas' personal papers. Based on what she found in the papers at the premises, Ms. Schalow then issued notices of levy to other individuals and entities.

On January 13, 1997, the plaintiff filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Wisconsin, and on the next day, he delivered a copy of that petition to Ms. Schalow. He also called Larry Locke, who was Ms. Schalow's group manager, on January 14, 1997. Mr. Locke said that he was aware of the bankruptcy petition, but he nevertheless refused to release plaintiff's business premises, and its contents, to the plaintiff. Ms. Schalow called the Wisconsin Secretary of State on January 14, 1997 and was notified that the plaintiff's corporation had been dissolved. She still "refused," however, to release Mr. Haas' business

premises and personal property.

Mr. Haas claims that both Ms. Schalow and Mr. Locke "knew or should have known" that there were no reasonable grounds with which to obtain a writ of entry against a dissolved corporation and that, in obtaining such a writ of entry and directing that the locks at the premises be changed and padlocked, the defendants acted in bad faith. The plaintiff alleges that the defendants have violated his Fourth, Fifth, and Ninth Amendment rights and that their refusal to release the property violated the automatic stay provisions of *11 U.S.C. § 362.* He further alleges that the was damaged in the amount of $4000 a day due to the seizure of the premises.

II. Analysis

I will first address the defendants' second argument--that Mr. Haas' exclusive remedy is a statutory, not constitutional one--because that argument is dispositive. Specifically, the defendants argue that a Bivens action, one against individual federal officers for a violation of a plaintiff's federal constitutional rights, is not proper when Congress has already provided a statutory remedy that purports to be the exclusive remedy. Here, the defendants claim, Mr. Haas' exclusive remedy is provided by the IRS code.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 29 L. Ed. 2d

619, 91 S. Ct. 1999 (1971), the U.S. Supreme Court provided plaintiffs with a judicially created cause of action against federal officers. However, the Court also expressly said that the federal courts must refrain from extending Bivens when Congress has indicated that a parallel statutory remedy is exclusive, see *Bush v. Lucas,* 462 U.S. 367, 378, 76 L. Ed. 2d 648, 103 S. Ct. 2404 (1983). In Bush, the Court said that "when Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the courts' power should not be exercised." 462 U.S. at 378; see also *Schweiker v. Chilicky,* 487 U.S. 412, 423, 101 L. Ed. 2d 370, 108 S. Ct. 2460 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies."); *Cameron v. IRS, 773 F.2d 126, 129 (7th Cir. 1985)* ("Courts will not create a damage remedy for the violation of a constitutional right when Congress has created explicit remedies or when a court-created remedy would interfere with the effective functioning of the government.").

Ms. Schalow and Mr. Locke claim that two separate sections of the IRS code provide Mr. Haas with his only remedies. The first section states:

> If, in connection with any collection of Federal

> tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

26 U.S.C. § 7433 (emphasis added). The second section, 26 U.S.C. § 7432(a), allows a plaintiff to sue the United States if "any officer or employee of the Internal Revenue Service knowingly, or by reason of negligence, fails to release a lien . . . on property of the taxpayer."

As seen above, section 7433 explicitly states that it is the sole redress for a plaintiff seeking to recover for the actions of IRS officials in their collection activities. While section 7432 does not make the same explicit statement, section 7433's mention of section 7432 is a recognition that, as far as exclusivity, those sections should be treated the same. Several courts have found that Congress intended section 7432, along with 7433, to prevent a plaintiff from making constitutional Bivens-like claims against individual IRS agents. For example, in *Vennes v. An Unknown Number of Unidentified Agents of the United States,* 26 F.3d 1448, 1453 (8th Cir. 1994), *cert. denied,* 513 U.S. 1076, 130 L. Ed. 2d 627, 115 S. Ct. 721 (1995),

the plaintiff claimed that IRS agents illegally confiscated his business, sold its assets, and forced him out of business, even though he did not owe any taxes. The court of appeals for the eighth circuit said that the plaintiff's Bivens action could not go forward because Congress, in enacting sections 7432 and 7433, intended to preclude such actions: "These carefully crafted legislative remedies confirm that, in the politically sensitive realm of taxation, Congress's refusal to permit unrestricted damage actions by taxpayers has not been inadvertent." *Vennes,* 26 F.3d at 1454.

Similarly, in *Fishburn v. Brown,* 125 F.3d 979, 982-83 (6th Cir. 1997), the court of appeals for the sixth circuit dismissed for lack of subject matter jurisdiction a claim in which a plaintiff claimed that an individual IRS agent violated her Fifth Amendment right to due process by seizing her car. Noting the existence of section 7433, the court said that "since Congress has created statutory provisions that enabled Fishburn to challenge the IRS agents' actions, she does not have an actionable Bivens claim for a violation of due process." *Fishburn,* 125 F.3d at 983.

In another relevant case, the court of appeals for the seventh circuit found that the plaintiff suing the IRS had not stated a claim for a violation of his constitutional rights. The court went on to say in dicta, however, that even if the court could give the plaintiff a remedy, the plaintiff could not recover damages from individual employees of the IRS. The court said:

> Congress has given taxpayers all sorts of rights against an overzealous officialdom, including, most fundamentally, the right to sue the government for a refund if forced to overpay taxes, and it would make the collection of taxes chaotic if a taxpayer could bypass the remedies provided by Congress simply by bringing a damage action against Treasury employees. It is hard enough to collect taxes as it is; additional obstructions are not needed.

Cameron v. IRS, 773 F.2d 126, 129 (7th Cir. 1985); see also *McMillen v. United States Dept. of Treasury,* 960 F.2d 187, 190-91 (1st Cir. 1991) (stating, in dicta, that "Congress has deemed Sections 7432 and 7433 the exclusive remedies for damages resulting from such abuses"); *Wages v. IRS,* 915 F.2d 1230, 1235 (9th Cir. 1989), *cert. denied*, 498 U.S. 1096, 112 L. Ed. 2d 1071, 111 S. Ct. 986 (1991).

Mr. Haas, in his brief in response to the defendants' motion to dismiss, repeats his statement that, generally, plaintiffs may recover damages for a violation of their Fourth Amendment rights by federal officials. He does not address, however, the defendants' specific argument that sections 7432 and 7433 are his exclusive remedies, and he does not argue that the government actions for which he is suing were not "in connection with any collection of Federal tax."

I believe that Ms. Schalow's entry onto the property,

her search of "papers" at the property, and her subsequent levy of property were all in connection with the collection of Romanite's unpaid taxes. I also find that Ms. Schalow's and Mr. Locke's alleged refusal to release property that had been levied in order to satisfy Romanite's taxes was related to the collection of taxes. Therefore, based on the extensive caselaw cited above, Mr. Haas cannot maintain a Bivens action against these individual defendants. His sole remedy can be found in the tax code. I need not address the defendants' specificity and qualified immunity arguments.

The plaintiff may have anticipated the court's finding that he cannot sue Ms. Schalow and Mr. Locke, because after the defendant's motion to dismiss was fully briefed, the plaintiff filed a motion for leave to file a supplemental complaint and to add defendants. Specifically, Mr. Haas proposes to add the Town of Mount Pleasant, employees of the Mount Pleasant Police Department, and "federal employees" as defendants. He then goes on to describe the alleged harassment that special agents of the IRS and employees of Mount Pleasant have committed upon his brother, Matthew Haas.

Apart from the issue of whether the plaintiff has standing to sue for injuries his brother may have suffered, Mr. Haas' proposed amended complaint cures none of the deficiencies discussed above. His motion to amend will be denied, and I will dismiss this action, with prejudice, for the plaintiff's failure to state a claim against the named

defendants.

Therefore, IT IS ORDERED that the defendants' motion to dismiss be and hereby is granted.

IT IS ALSO ORDERED that the plaintiff's motion for leave to file a supplemental complaint and to add defendants be and hereby is denied.

IT IS FURTHER ORDERED that the clerk of court be and hereby is directed to dismiss this action, with prejudice, for the plaintiff's failure to state a claim upon which relief can be granted.

Dated at Milwaukee, Wisconsin, this 26th day of January, 1998.

Myron L. Gordon

United States District Judge